MALAYSIAN REPORTS

Khoo Soo Teong v Khoo Siew Ghim & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-137-1991
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED AZMI AND HARUN HASHIM SCJJ
5 AUGUST 1991

Civil Procedure — Interlocutory injunction — Jurisdiction to grant injunction — Specific Relief Act 1950, Chapter IX — Rules of the High Court 1980, O 29 r 1(1)

In this case there had been a dispute between members of a family over the control of a family company. The appellant was the chairman and managing director of the family company and the respondents were his daughters. An extraordinary general meeting of the company had been held at which it was resolved that each ordinary shareholder would be offered a rights issue. The respondents were not present at the meeting nor were they informed of the meeting. The first respondent threatened to take appropriate legal action to obtain a declaration that the rights issue of shares was invalid. The appellant then took out a writ for a declaration that the respective respondents held the shares allotted to them as nominees for the appellant. The appellant applied for an interlocutory injunction to restrain the respondents from exercising their rights as shareholders. An interlocutory injunction was granted but was subsequently dissolved by the High Court. The appellant appealed.

Held, dismissing the appeal:

(1) An application for an injunction may be made by any party to a cause or matter at any stage of the proceeding whether or not a claim for the injunction is included in the party's writ and statement of claim or counterclaim or third party notice as the case may be.

(2) In this case there could not be any loss or irreparable damage to the appellant as the shares of the respondents could not be transferred without the approval of the board of directors. The respondents had been advised that they had grounds to institute proceedings against the company and the directors under the Companies Act 1965 (Rev 1973) and to enforce their legitimate rights as shareholders of the company.

[Bahasa Malaysia summary

Di dalam kes ini pertikaian berbangkit antara ahli keluarga mengenai perkara syarikat keluarga. Perayu adalah pengerusi dan pengarah urusan syarikat itu dan responden-responden adalah anak perempuannya. Suatu mesyuarat agung luar biasa syarikat itu telah diadakan di mana diputuskan tiap-tiap pemegang saham biasa ditawarkan keluaran saham secara hak (rights issue). Responden-responden tidak hadir dan mereka tidak diberitahu mengenai mesyuarat itu. Responden pertama telah mendesak hendak mengambil tindakan guaman untuk mendapat deklarasi bahawa keluaran saham itu tidak sah. Perayu pula mengeluarkan writ untuk mendapat deklarasi bahawa tiap-tiap responden-responden itu memegang saham yang diberi kepada mereka sebagai namaan (nominee) bagi perayu. Perayu memohon mendapat injunksi interlokutori untuk menahan responden-responden menggunakan hak mereka sebagai pemegang saham. Injunksi interlokutori itu telah diberi akan tetapi kemudiannya telah dibubarkan di Mahkamah Tinggi. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan:

(1) Permohonan mendapat injunksi boleh dibuat oleh sesuatu pihak kepada sesuatu kausa atau perkara di manamana peringkat prosiding sama ada tuntutan bagi injunksi itu dimasukkan atau tidak di dalam writ pihak itu atau penyata tuntutan atau tuntutan balas atau notis pihak ketiga, mengikut keadaan yang berkenaan.

(2) Di dalam kes ini tidak boleh terjadi kerugian atau kebinasaan yang tidak boleh dipulihkan kepada perayu oleh kerana saham responden tidak boleh dipindahkan tanpa kelulusan lembaga pengarah. Responden telah dinasihatkan bahawa mereka mempunyai alasan untuk mengambil tindakan terhadap syarikat itu dan pengarah-pengarahnya di bawah Akta Syarikat 1965 dan untuk menguatkuasakan hak yang sah sebagai pemegang saham syarikat itu.]

Cases referred to

1 *Colebourne* v *Colebourne* (1876) 1 Ch D 690 (not folld)
2 *'The Siskina'* [1979] AC 210; [1977] 3 All ER 803 (refd)

Legislation referred to

Specific Relief Act 1950 Chapter IX
Rules of the High Court 1980 O 29 r 1(1)

Appeal from: Civil Suit No 22-357-1990 (High Court, Penang)

Gan Teik Chee for the appellant.
Tan Phock Kin for the respondents.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): This was an appeal arising out of a dispute between members of a family over the control of Khoo Soo Teong Sdn Bhd ('the family company'). The appellant was the chairman and managing director of the family company and the respondents are his daughters. The family company was incorporated on 12 May 1981 and as on 14 October 1981 the allotment of shares in the family company was as follows:

Khoo Soo Teong (the appellant)	125 shares
See Swee Kan (the appellant's wife)	125 shares
Khoo Kay Thuan (the appellant's son)	250 shares
Khoo Siew Im (the appellant's daughter)	1,000 shares
Khoo Siew Ghim (the appellant's daughter)	1,000 shares

The relationship between the father and the daughters must probably have soured during the late 1980s culminating in the extraordinary general meeting of the family company held on 28 February 1989. At that meeting, it was resolved by the shareholders present (meaning the father, the wife and the son) that each ordinary shareholder would be offered a rights issue of 99 ordinary shares with a nominal value of $99 for each ordinary share registered in the name of a shareholder. At

this same meeting it was also resolved that the offer of the rights issue must be accepted and fully paid for not later than 15 March 1989 and if not accepted, those rights issue shares would be dealt with as the directors deem fit. The daughters (respondents) were not informed of this extraordinary general meeting nor the resolutions and the grounds given for not informing them was that their addresses were not known to the directors. According to the first respondent, however, no correspondence relating to the family company was in fact ever sent to her since 1986 although her address was known to the appellant.

By a letter dated 30 August 1990, the first respondent through her solicitors questioned the rights issue of the family company and asked for an explanation failing which she would instruct her solicitors to take appropriate legal action to obtain a declaration that the rights issue shares were invalid. On 27 September 1990, a writ was taken out by the father against the daughters claiming, inter alia, for a declaration that the respective respondents held the shares originally allotted as nominees for the father.

On 5 October 1990, the appellant came before the learned judge in an ex parte summons-in-chambers for an interlocutory injunction to restrain the respondents from exercising their rights as shareholders. The learned judge granted the interlocutory injunction. The application to set aside the injunction was heard by the learned judge on 23 January 1991 and the learned judge dissolved the injunction. On 22 February 1991, the learned judge issued a certificate of no further argument under O 56 r 2(2) of the Rules of the High Court 1980 ('RHC'). Thus the appeal before this court.

After hearing arguments in the appeal we dismissed the appeal.

We agreed that on the facts of this case the interlocutory injunction was correctly dissolved. However as conceded by Encik Gan, counsel for the appellant, only one issue had to be clarified and this arose from the written judgment of the learned judge. The written judgment was in Bahasa Malaysia and the relevant paragraph reads as follows:

> Pemohon yang ingin mendapat perintah injunksi mestilah mempunyai satu kausa tuntutan undang-undang yang membolehkan beliau mendapat satu relief substantif (the applicant must have a cause of action in law to entitle him to substantive relief) ('*The Siskina*' [1979] AC 210). Maka oleh kerana injunksi bukanlah satu kausa tuntutan, tetapi satu remedi, perintah injunksi 5 Oktober adalah tidak sah oleh kerana ia telah diperolehi tanpa satu relief substantif yang berasaskan kausa tuntutan di dalam writ.

The translation in English of the above cited paragraph of the judgment as provided by the appellant and not disputed by the respondent reads as follows:

> An applicant for an injunction must have a cause of action in law to entitle him to a substantive relief ('*The Siskina*' [1979] AC 210). Therefore, since an injunction is not a cause of action but a remedy, the injunction dated 5 October is invalid because it had been obtained without a substantive relief as grounded upon a cause of action in the writ.

The first sentence of the paragraph which states that an applicant for an injunction must have a cause of action in law to entitle him to a substantive relief is a correct statement of law. The second sentence, however, is only partially correct. The misdirection was as a result of the learned judge reading only the endorsement in the writ and not the statement of claim.

Under our law the jurisdiction to grant injunction is expressed in Chapter IX of the Specific Relief Act 1950 (on the law of injunctions generally) which states that preventive relief may be granted at the discretion of the court by injunction. The injunction may be temporary or perpetual. Temporary injunctions are such as are to continue until a specified time, or until the further order of the court. They may be granted at any period of a suit, and are regulated by the law relating to civil procedure.

Under O 29 1(1) of the RHC,

> An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, *whether or not a claim for the injunction was included in that party's writ*, originating summons, counterclaim, or third party notice, as the case may be. (Emphasis added.)

Thus under our law an application for injunction may be made by any party to a cause or matter at any stage of the proceeding, whether or not a claim for the injunction is included in that party's writ and statement of claim or counterclaim or third party notice, as the case may be. See also 24 *Halsbury's Laws of England* (4th Ed) para 1048. *Colebourne* v *Colebourne*[1] which required that the plaintiff, before applying for interim injunction, should endorse his writ to include the prayer for injunction is not good authority in our law.

Coming to the case cited by the learned judge, *Owners of cargo lately laden on board the vessel Siskina & Ors* v *Distos Compania Naviera SA, 'The Siskina'*,[2] it is to be noted that the real issue there was the interpretation of O 11 r 1(1) of the English Rules of the Supreme Court. At stake in that case was the insurance moneys which were payable in England to the shipowners' brokers. The first step in the proceedings was an application by the cargo owners ex parte to the judge of the Commercial Court in London for leave to issue a writ against the shipowners and to serve notice of it out of jurisdiction to restrain the shipowners from disposing of their assets within the jurisdiction of the High Court

including the insurance proceeds in respect of the loss of the vessel.

On an ex parte application to Mocatta J, the learned judge gave leave for service on the shipowners out of jurisdiction and granted a Mareva injunction against them. The matter came before Kerr J on an application by the shipowners to set aside the service of notice of the writ and all subsequent proceedings. Kerr J granted the application but also gave the cargo owners leave to appeal to the Court of Appeal. On appeal, the Court of Appeal by a majority (Lord Denning MR and Lawton LJ, Bridge LJ dissenting) reversed the judgment of Kerr J and restored the Mareva injunction as originally granted by Mocatta J. The appeal then went before the House of Lords.

Order 11 of the English Rules of the Supreme Court permits the High Court in England to grant leave to a plaintiff to serve its process on a person outside the territorial limits of England and Wales in those cases, but only in those cases, that are specified in sub-paras (a) to (o) of r 1(1) or in r 2. Accordingly, it is not permissible in any action commenced by service of process on a person out of the jurisdiction to litigate any claim that does not fall within one or other of the said sub-paras (a) to (o). Thus the House of Lords allowed the appeal and restored the judgment of Kerr J which set aside the writ and all subsequent proceedings.

The other thing to be noted is that unlike our present case, there was no valid cause of action in '*The Siskina*'.[2] The cargo owners had no legal or equitable right or interest in the insurance moneys payable to the shipowners in respect of the loss of the vessel. All that they had was a claim to monetary compensation arising from a cause of action against the shipowners which is not justiciable in the High Court in England without the shipowners' consent — which they had withheld.

We may also mention that the application by the appellant in the present case for the interlocutory injunction was grounded exclusively on para 15 and 16 of the supporting affidavit, the translation of which reads as follows:

> 15 By her solicitor's letter dated 30 August 1990 the first defendant questioned the said rights issue. A copy of the said letter is shown to me and annexed to this affidavit marked 'KST-3'. I gather from the said letter that the defendants will attempt to exercise their rights as registered shareholders to obtain a declaration on technical grounds that the said rights issue is invalid before the determination of the suit herein.
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> 16 In the premises, I would suffer irreparable damage, ie the loss of 173,625 ordinary shares (12,375 + 61,500 + 99,750 ordinary shares), if the defendants are not restrained by injunction from acting as stated in para 15. Moreover, I would become a minority shareholder in the list of registered shareholders of the said company.

In the affidavit-in-support to dissolve the injunction, it was stated clearly that there could not be any loss or irreparable damage to the appellant as the shares of the respondents could not be transferred without the approval of the board of directors. It was also revealed in the same affidavit that the respondents had been advised that they had grounds to institute proceedings against the company and the directors under the Companies Act 1965 and to enforce their legitimate rights as shareholders of the company.

We agreed with the learned judge that under the circumstances, the interlocutory injunction should be dissolved and dismissed the appeal but made no order as to costs. Deposit to be refunded.

Appeal dismissed.

Solicitors: *Gan Teik Chee & Ho; Thillaimuthu & Phock Kin.*

Reported by *Prof Ahmad Ibrahim*

Yap Fook Cheong & Anor v Burkill (Malaya) Sdn Bhd & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-368-1990
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
5 JULY 1991

Civil Procedure — Appeal to Supreme Court — Amount or value of subject matter of claim less than $100,000 — Leave of Supreme Court or judge of High Court required — Courts of Judicature Act 1964, s 68(1) & (2)

In this case the first respondent had obtained a default judgment against the appellants who were directors of a company for the sum of $67,360.69 with interest. The company made an application to set aside the default judgment but this was dismissed, as was an application for stay of execution. The first respondent then applied for a winding-up order and by order dated 8 September 1986 the second respondent was appointed liquidator. Some three years afterwards on 8 August 1989 the appellants took out a writ to challenge the winding-up order. The first respondent applied to strike out the statement of claim on grounds that it disclosed no reasonable cause of action, was misconceived and an abuse of the process of the court. The learned trial judge ordered the writ and statement of claim to be struck out. The appellants appealed. A preliminary objection was raised that the appeal was not properly before the court on the ground that no leave had been obtained under s 68(1)(a) of the Courts of Judicature Act 1964.

Held, upholding the preliminary objection:
As the amount or value of the subject matter of the claim was less than $100,000 the appeal could only be brought with leave of the Supreme Court or a judge of the High Court under s 68(1)(a) of the Courts of Judicature Act 1964.